Texaco, Inc. *and* Leon J. Dove and Antonio O. Dominguez. Cases 28-CA-5937-1 and 28-CA-5937-2

January 26, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On September 2, 1981, Administrative Law Judge James T. Barker issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order[2] as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Texaco, Inc., El Paso, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(b):

"(b) Make Leon Dove whole by paying sick and accident benefits due him during the period January 8, 1980, to such date as he was released from medical care."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Act gives all employees the following rights:

To organize themselves
To form, join, or support unions
To bargain as a group through a representative they choose
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all such activity except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

WE WILL NOT withhold payment of sick and accident benefits payable to the following named employees for the designated period, or otherwise discriminate against employees, because of any union activity by them, or by any of our employees, including strikes.

Antonio Dominguez—January 10, 1980, through February 18, 1980.
Leon Dove—January 8, 1980, through such date as he was released from medical care.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL make whole Antonio Dominguez and Leon Dove for sick and accident benefit payments due them for the above-described time it was withheld, together with interest.

TEXACO, INC.

DECISION

STATEMENT OF THE CASE

JAMES T. BARKER, Administrative Law Judge: This case was heard before me at El Paso, Texas, on December 11, 1980, and February 17, 1981, pursuant to an order consolidating cases and consolidated complaint and notice of hearing issued on July 16, 1980, by the Region-

[1] Respondent excepts, *inter alia*, to the Administrative Law Judge's finding that Leon J. Dove was not released from medical care until January 14, 1980. We find, in agreement with Respondent, that the record is not clear as to whether Dove was released on that date or 1 week earlier, as contended by Respondent. Therefore, we shall defer the determination of the exact date Dove was released from medical care to the compliance portion of this proceeding, and will modify the Administrative Law Judge's recommended Order accordingly.

Member Jenkins adheres to his partial dissent in *E. L. Wiegand Division, Emerson Electric Co.*, 246 NLRB 1143 (1979), but notes that the principles contained therein are not involved in this proceeding. Members Zimmerman and Hunter note that they did not participate in *Emerson Electric* and, inasmuch as the remedial issue raised in Member Jenkins' partial dissent is not presented here, express no opinion on that remedial issue.

[2] The Administrative Law Judge correctly ordered that backpay with interest be paid the discriminatees, but inadvertently failed to specify the applicable interest rate. In accordance with our established policy, we hereby direct that interest on the backpay be computed in the manner set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would award interest on the backpay due based on the formula set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

al Director of the National Labor Relations Board for Region 28.[1] The complaint in Case 28-CA-5937-1 is based upon a charge filed by Leon J. Dove, an individual, on June 12, and the complaint in Case 28-CA-5937-2 is based on a charge filed on June 16 by Antonio O. Dominguez, an individual.[2] The consolidated complaint alleges violations of Section 8(a)(1) and (3) arising from the action of Respondent in discontinuing the payment of sick leave benefits to Dove and Dominguez because the Union had engaged in an economic strike against Respondent. The parties were provided full opportunity to make opening and closing statements, to examine and cross-examine witnesses, introduce relevant evidence, and to file briefs with me. Counsel timely filed briefs with me.

Upon the basis of the entire record, my observation of the witnesses, and the briefs filed with me, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

At all times material herein, Respondent has been a corporation duly organized under the laws of the State of Delaware, and has engaged in the business of refining and distributing gasoline and other petroleum products throughout the United States, including El Paso, Texas. During the 12-month period immediately preceding the issuance of the consolidated complaint herein, Respondent, in the course and conduct of its business operations, purchased goods, materials, and services valued in excess of $50,000 in connection with its operations at its El Paso facility, and caused the same to be transported in interstate commerce and delivered to its El Paso facility directly from suppliers located outside the State of Texas.

Upon the foregoing facts which are not in dispute, I find that at all times material herein Texaco, Inc., has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that at all times material herein, Oil, Chemical and Atomic Workers International Union, Local No. 4-612, AFL-CIO, hereinafter called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The General Counsel contends that under the principles enunciated by the Board in *E. L. Wiegand Division, Emerson Electric Co.*, 246 NLRB 1143 (1979), Respondent violated Section 8(a)(1) and (3) of the Act by discountinuing the accident and sick leave benefits of unit employees Dove and Dominguez at the commencement of the strike at the El Paso facility which began on January 8 and continued until on or about March 29. It is the contention of the General Counsel that both Dove and Dominquez were on authorized sick leave at relevant periods prior to January 8, and that, pursuant to a blanket, previously announced policy, Respondent discontinued the sick leave benefits to Dove and Dominguez without first acquiring information that the employees had affirmitively acted to show public support for the strike.

Respondent denies the commission of any unfair labor practices and asserts, initially, that the *Emerson Electric* principle is not applicable in the factual circumstances of this case. In any event, Respondent contends, the rule in *Emerson Electric* is unreasonable and conflicts with well-established principles of labor law.

B. *Pertinent Facts*

1. Background facts

At all material times Respondent has recognized the Union as the exclusive collective-bargaining representative of all its approximately 125 operating and maintenance employees employed at the El Paso facility. Article VIII of the collective-bargaining agreement which all relevant prior times had been in effect between Respondent and the Union includes as an employee benefit an accident and sick leave benefit plan, hereinafter referred to as A & S benefits, and the constituent elements of the plan are defined in an officially promulgated benefits plans handbook. In substance, the A & S plan is a noncontributory benefit plan which provides for payment of benefits to regular employees with 1 year or more of service who are absent from work due to illness or inury and are unable to work because of that illness or injury. Benefits are determined by length of service. Employees with 10 years of service who otherwise qualify under the plan to receive benefits are entitled to 13 weeks of full pay and 39 weeks of half pay thereafter.

As a consequence of negotiations between Respondent and the Union, the parties entered into a memorandum of agreement renewing the previously existing collective-bargaining agreement between them to be effective from January 8, 1979, through January 7, 1981. The January 19, 1979, memorandum of agreement had the effect of substantively modifying certain provisions of the previous agreement and of specificaly renewing all other terms and provisions thereof. The memorandum of agreement provided, *inter alia*, that upon written notice to the Company given no earlier than November 1, 1979, the parties agreed to negotiate with respect to the general hourly wage scale, full-paid uniform health care benefits package, and improvement in vacation schedules. The memorandum of agreement further provided that if the parties failed to reach agreement on these specified subjects within 60 days after the giving of timely notice, the Union would have the right to strike, but not prior to January 8, 1980. On November 1, 1979, Respondent

[1] Unless otherwise specified, all dates herein refer to the calendar year 1980.

[2] I reject Respondent's contention that this matter is improperly before the Board because it derives from charges filed by individual unit members whose rights to proceed individually assertedly were extinguished by reason of the strike settlement agreement achieved between the Union and Respondent requiring the Union to withdraw pending unfair labor practice charges and not to initiate new ones relating to strike conduct or occurrences. See, e.g., *Lodge 743 International Association of Machinists Corp.*, 337 F.2d 5, 8-9 (2d Cir. 1964).

received the Union's notice of an intention to strike on January 8, 1980. Prior to the strike, Respondent prepared a 3-page document entitled, "Procedures in Case of Strike" and dispatched it to the Union and handed it out to all of the employees. In essence, the document explicated Respondent's policy with respect to funding, accrediting employee service, and implementation of the fringe benefit and leave provisions of the collective-bargaining agreement during the period of any strike, which might transpire. Included in the document was the following:

> *Accident and Sick (A & S) Benefit Plant*
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> Upon commencement of a strike, all A & S benefits will be discontinued, except in those cases involving accident or injury. A & S benefits will be continued to those employes who are disabled due to industrial injury until medically released by their doctors or until expiration of such benefits in accordance with the Plan's benefit schedule, whichever occurs first.
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> Decision will be reserved regarding the payment of A & S benefits upon termination of the strike for employees who become disabled during the strike and whose disability continues beyond the termination of the strike.
>
> Decision will also be reserved regarding the resumption of A & S benefits which were discontinued at the beginning of the strike for those employees who are still disabled after the termination of the strike.
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> Under no circumstances will A & S benefits be payable if they would not have been payable in the absence of a strike.
>
> In a related sense the benefits plan handbook provides in pertinent part that:
>
> Should you [employee] become ill or have an accident while not at work, you are eligible for Accident and Sick Benefits unless you are on a personal business or military leave of absence or on layoff status at the time of such illness or accident. Should you receive full pay for vacation periods, you will not receive benefits under this Plan if you become sick while on vacation. If you cannot return to work on the date you anticipated, however, the Plan will apply against further absence.

Under the plan there is no vesting or accrual of A & S benefits, and benefits are paid to employees qualified to receive them out of current operating expenses. In the face of a strike, it is the policy of Respondent to pay A & S benefits to employees who were absent due to an *industrial* illness or injury at the time the strike commences for as long as their absence and their incapacity to work due to industrial illness or injury continue. A & S benefits to employees absent due to illness or injury arising from *nonindustrial* causes cease with the commencement of the strike.[3]

Frank Smith, Respondent's supervisor of employees relations in the El Paso area, testified credibly that a desire on the part of the Company not to finance the strike efforts of its employees was one of the principal considerations underlying this policy. He further credibly testified, in effect, that other nondiscriminatory administrative considerations dealing essentially with the integrity of employee claims of entitlement and verification of illness were the other motivating factors.

Smith further credibly testified that after the strike commenced on January 8, no employee whose A & S benefits had been terminated came forward to disavow the strike or to affirmatively establiah their entitlement to A & S benefits. Moreover, after the strike commenced, the Union did not undertake to inform Smith that any employee whose A & S benefits had been terminated was not actually supporting the strike. As a general policy, Respondent does not require medical verification of illness for absences of less than 1 week. Medical substantiation is "frequently" required in connection with absences of longer duration.

2. The alleged proscribed conduct

Leon Dove had been an employee of Respondent for approximately 25 years when the strike commenced on January 8. He was employed in the bargaining unit represented by the Union at the El Paso facility. On December 10, 1979, Dove had gone on sick leave for gall bladder surgery. The surgery was performed by Dr. Joseph Motes, Jr., and Dove subsequently consulted with Dr. Motes concerning his condition. This consultation took place during the first week of January, and Dr. Motes issued Dove a written release to return to work effective January 7. Dr. Motes issued the release pursuant to Dove's request but advised Dove that due to the nature of Dove's work he should use his discretion in determining actually when to return to duty. Dove visited his personal physican, Dr. William M. Tubbs, on January 4 and 11. On January 4, Dr. Tubbs told Dove, in substance, that, in light of the nature of the operation which he had undergone, he advised against an early return to duty. He suggested that Dove wait "at least another week" until returning to work. Dove considered the matter and, in the course of Dove's office visit on January 11, Dr. Tubbs gave Dove an oral release to return to work on January 14. Pursuant to Dove's subsequent request, Dr. Tubbs provided a written release, dated January 29, stating, "The above patient can return back to regular duty work January 14, 1980."[4] On February 4, Dr. Motes responded to a written inquiry dispatched to him by Respondent. In his response, Dr. Motes certified

[3] The foregoing is based on documentary evidence of record, stipulation of the parties, and the credited testimony of Frank Smith.

[4] The above findings with reppect to the office visits paid by Dove to the respective physicans, as well as the releases provided Dove, are based on the credited testimony of Leon Dove and documentary evidence of record. Dove's testimony in these respects was confused and imprecise as to chronology and thus, to an extent, the findings are based on inference and probability distilled from the totality of the record.

that his records disclosed that Dove was released to resume work on or about Monday, January 7.

Dove was a member of the Union and was on dues checkoff when the strike commenced. As a union member, he considered himself obliged to support an authorized strike whether or not he agreed with its goals. Prior to strike he had voted in favor of its authorization. Dove understood that as a union member he was subject to fine and expulsion if he had undertaken any effort to hinder the progress of the strike. Dove did not participate in the picketing activity that accompanied the strike but after January 14 he periodically performed telephone duties at the Union's headquarters during the course of the strike. The union hall was located approximately 1-1/2 miles from Respondent's El Paso facility. When Dove was on duty at the union headquarters, his ingress and egress was through the main entrance. During the course of an earlier strike by the bargaining unit members called by the Union against Respondent, Dove and all other bargaining unit members honored the picket line throughout the entire course of the strike.

Dove's A & S benefits were terminated on January 8, the initial day of the strike. After being notified of the termination of his A & S benefits, Dove made no effort to lodge a protest with Respondent. He did not undertake to contact Frank Smith, or any representative of Respondent, during the strike to indicate his availability for work.

Antonio Dominguez was at all relevant times a member of the Union employed in the bargaining unit at the El Paso plant of Respondent. Dominguez entered Respondent's employ in 1946 and has been continuously employed at all times thereafter. On December 3, 1979, Dominguez commenced a vacation which was scheduled to continue through January 4. Pursuant to further arrangements he had scheduled another period of vacation to begin January 7, allocable to his 1980 vacation entitlement. During the course of his initial vacation, and prior to the commencement of the strike on January 8, Dominguez became ill and was hospitalized for diabetes. He made this known to Frank Smith who considered his request that his vacation status be terminated and that he be put on sick leave. Smith told Dominguez that he was unable to grant his request because his current year's (1979) vacation had already commenced. However, Smith informed Dominguez that the rules governing this question would permit Dominguez to postpone his vacation planned to commence on January 7, 1980, and enter sick leave status on that date. This arrangement was formulated. Because of the 1-day waiting period requirement attaching to A & S benefits, Dominguez was in sick leave status without pay on January 7 but was granted A & S benefits for January 8, the last working day prior to the commencement of the strike. Dominguez' A & S benefits terminated on January 9 and were not thereinafter reinstated. On June 14, Dr. Harold J. H. Marshall, at the request of Dominguez, provided Dominguez with a written statement setting forth that:

> Antonio O. Dominguez was ill and unable to work from January 7, 1980. His diagnosis was diabetes mellitus (out of control). He recovered sufficiently to permit him to return to work February 18, 1980.

Dominguez credibly testified that, if he had been healthy on January 8, he would not have crossed the picket line to resume work. On February 18, Dominguez began picketing activities in support of the strike and honored the picket line for the entire term of the strike. In this period of time, Respondent received no information to the effect that Dominguez was actively supporting the strike, and no information to the contrary was conveyed.[5]

Conclusions

The threshold issue in the instant case is whether on the basis of the Board's Decision in *E. L. Wiegand Division, Emerson Electric Co.*, 246 NLRB 1143 (1979), enfd. as modified, 650 F.2d 463 (3d Cir. 1981), an employer violates Section 8(a)(1) and (3) of the Act by terminating at the outset and for the duration of a protected economic strike sick and accident benefits to all unit employees except those whose disability derives from industrial injury, in circumstances wherein the reason advanced by the employer for terminating the benefits relate solely to (1) the unwillingness of the employer to assist in financing a strike against itself and (2) nondiscriminatory administrative considerations.[6] I find that under *Emerson Electric* Respondent must be held here to have violated Section 8(a)(1) and (3) of the Act, and that the discriminatory effect flows from the inherently destructive nature of Respondent's prestrike policy announcement which was implemented and triggered by the commencement of the strike. *N.L.R.B.* v. *Erie Resistor Corp., et al.*, 376 U.S. 221 (1963); *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). Absent here is any overtone or undercurrent of a generic antiunion hostility or purpose otherwise to defeat the Union.

In the *Emerson* case, the Board held that the respondent therein violated Section 8(a)(1) and (3) of the Act by terminating sick and accident benefits to employees who were physically unable to work on and after the initial day of the strike, because other employees actively employed at the respondent's facility had gone out on strike. In reaching this conclusion, the Board, *inter alia*, overruled *Southwestern Electric Power Company*, 216 NLRB 522 (1975), and adopted the rationale that the em-

[5] The foregoing findings are based on a composite of the credited testimony of Frank Smith and Antonio Dominguez, as well as documentary evidence of record. While there are inferences in the record that the medical statement of Dr. Marshall was requested by Dominguez in anticipation of the filing of charges alleging unfair labor practices deriving from Respondent's termination of Dominguez' A & S benefits, the authenticity of the statement was not challenged, and the accuracy of the representations contained therein was not convincingly placed in doubt.

[6] In enforcing the Board's Order in *Emerson*, and endorsing the principal component of the substantive pronouncements therein, the Third Circuit Court of Appeals modified the remedial provisions of the order which had directed benefits of disabled employees be terminated at the time the employee acquired information to the effect that the relevant individuals had affirmatively acted to show public support of the strike. This remedial issue is not present here for I do not interpret the General Counsel's claims interposed on behalf of Dove and Dominguez to encompass periods after they received their medical releases from their attending physicians.

ployees in question had a Section 7 right to refrain from declaring their position on the strike while they were medically excused. As a consequence, the Board declared:

> . . . an employer may no longer require its disabled employees to disavow strike action during their sick leave in order to receive disability benefits. To allow the termination of such benefits to certain employees as a result solely of the strike activity of others is to penalize the employees who have not acted in support of the strike.
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> * * * * *
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> However, while disabled employees need not affirmatively disavow the strike action, neither can they participate in the strike without running the risk of forfeiting benefits prospectively . . . . For all practical purposes, an employee, disabled or sound, who affirmatively demonstrates his support of the strike by picketing or otherwise showing public support for the strike, has enmeshed himself in the ongoing strike activity to such an extent as to terminate his right to continue disability benefits [footnote citations deleted].
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> * * * * *
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> Accordingly, we now hold that for an employer to be justified in terminating any disability benefits to employees who are unable to work at the start of a strike it must show that it has acquired information which indicates that the employee whose benefits are to be terminated has affirmatively acted to show public support for the strike.

The General Counsel contends that the instant matter falls squarely within the dictates of the Board's *Emerson Electric* decision and is in no significant respect distinguishable.[7] On the other hand, Respondent contends that the accident and sick benefits plan was one freely negotiated into the collective-bargaining agreement and that, by assenting to the inclusion of the plan in the negotiated agreement, the Union waived what the Board in *Emerson Electric* deemed a Section 7 right. Respondent contends his waiver resulted from the Union agreeing to limit A & S benefits to employees whose absence is caused *solely* by illness or injury, and by further agreeing to permit the Company to shift the burdening of proving entitlement to the employee claiming A & S benefits. Respondent asserts that this contractual reservation of rights requiring employees covered by the plan to come forward and present satisfactory evidence of entitlement to benefits is nowhere precluded by the *Emerson Electric* decision, for the Board in *Emerson* did not undertake to deny to employers the right to freely negotiate contractual provisions regarding the payment of A & S benefits, but rather fashioned decisional vehicle by which the Board "simply tightened the degree of proof required before an employer terminated A & S benefits during a strike to employees who would otherwise *be eligible under the employer's accident and sick benefit plan*," (Emphasis supplied.)

In sum, Respondent contends that A & S benefits were terminated at the outset of the strike on the theory that an employer has no legal obligation or reason to finance a strike against itself by paying benefits to strikers, and for other nondiscriminatory administrative reasons. Moreover, Respondent avers that, after their A & S benefits were terminated, neither Dove nor Dominguez complied with the requirements of promulgated benefits plan either by establishing their eligibility by providing medical certification routinely required by the Company, or by disavowing the strike. Further, Respondent submits that it had sufficient basis on the initial day of the strike to infer strike support on the part of employees whose benefits were terminated, evolving not only from historical background provided by the 100-percent effectiveness of the 1969 strike at the El Paso facility, and from mangagement awareness of the existence of the Union's disciplinary power over its members; but also from evidence developed during the course of the hearing serving to verify the accuracy of its prestrike judgment concerning the degree of support which unit employees would accord the strike.

Respondent further distinguished the applicability of *Emerson Electric* to the case at bar by contending that the evidence adduced herein establishes that Dove had received medical clearance to return to work 2 days prior to the beginning of the strike.[8]

In addition to contending *Emerson Electric* is distinguishable from the instant proceeding, Respondent advances argument which, in essential aspects, reduces to a contention that the *Emerson* decision is improvident in imposing a virtually *per se* rule proscribing any denial of accident and sick benefits during a strike; and is a decision which, (1) invites sophistry and gamesmanship on the part of employees and union officials; (2) improperly equates the Section 7 right of an employee to refrain from declaring his or her position on a strike while medically excused, with the bestowal of the right of an employee to keep his or her position with respect to the strike a secret in order to preserve their entitlement to A & S benefits; (3) significantly derrogates an employer's right not to finance a strike against itself; (4) forces employers to violate the Act by discriminating against classes of employees based on their visible support of a strike; and (5) leaves employers no effective means of enforcing their rights without violating the Act.

A decision in this matter must proceed from the premise that an administrative law judge of the Board is a bound by case precedent of the Board until and unless that precedent is supplanted by a decision of the United States Supreme Court. *Lenz Company*, 153 NLRB 1399, 1401 (1965). Further, no party to this proceeding challenges the legal efficacy of the proposition that an employer is not required to finance a strike against itself by

[7] The parties concede the equivalency for legal purposes of the present accident and sick benefits, on the one hand, and the disability benefits which were pertinent in the *Emerson* case.

[8] As found below, this is not a viable contention based on the totality of the evidence of record.

paying wages or other similar expenses. *General Electric Company*, 80 NLRB 510 (1948). Finally, it is an established principle of law that an employer may not withhold payment of already earned or accrued benefits contingent upon the cessation by employees of a legitlmate ecomonic strike. E.g., *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

The threshold finding is here made that, by reason of their past service, both Dove and Dominguez had qualified to receive A & S benefits under the terms of the collective-bargaining agreement and the promulgated benefits plan, for a period which extended beyond the commencement day of the strike. Moreover, I find that the A & S benefits pertinent herein were accrued benefits constituting deferred compensation for work already done. See, *E. L. Wiegand Division, Emerson Electric Co.* v. *N.L.R.B.*, 650 F.2d 463, 468 (3d Cir. 1981), enfg. as modified 146 NLRB 1143 (1979). A finding is further made that, contrary to Respondent, neither the language in the collective-bargaining agreement nor the provisions of the employee benefits plan contains a waiver cognizable by the Board as a defeasance of the rights of the employees herein "to refrain from declaring their position on this strike while they are medically excused" as a condition of qualifying for payment of accured accident and sickness benefits. While pointing to the negotiated collective-bargaining agreement and the corollary benefits plan as the source of its reserved right in the face of an impending strike to terminate A & S benefits, and to require employees affected by the termination to come forward and present satisfactory evidence of entitlement to benefits, Respondent is, in ultimate effect, interposing a waiver argument. *Perkins Machine Company*, 141 NLRB 98, 102 (1963), is instructive:

> . . . an effective waiver will be found to have been given when it appears in "clear and unmistakeable" language, either contained in the contract itself or expressed at the bargaining table before the contract was signed. On the other hand, a purported waiver will not be lightly inferred in the absence of "clear and unequivocal" language. Even when the parties consciously explore the matter during the negotiations and the contract fails to touch upon it, something more is required before the union will be held to have bargained away its rights, namely, a conscious relinquishment by the union, clearly intended and expressed.

Neither the collective-bargaining agreement nor the benefits plan itself contains "clear and unmistakeable" language from which a waiver may be inferred. Respondent came forward with no bargaining history supportive of its waiver claim. The *H. K. Porter Co.* principle is not here involved.[9] I find no waiver. See *Tide Water Associated Oil Company*, 85 NLRB 1096, 1098 (1949), cf. *United Aircraft Corporation* v. *N.L.R.B.*, 440 F.2d 85, 96 (2d Cir. 1971).

Against this background and upon the record developed in this proceeding, I find that Respondent, in close factual analogy to operative circumstances present in *Emerson Electric*, disseminated a declaration that A & S benefits would not be paid to employees who would otherwise receive them, and did so at a time when a strike at its facility was imminent. This declaration came before there was any showing of how widespread the strike would be and before Respondent was aware that any of the employees who were unable to work ratified or actively supported the strike. The General Counsel points to this conduct as evidence of an improper, antiunion motive warranting a finding of a violation of Section 8(a)(3) of the Act. No other direct evidence of unlawful motivation is present in the instant record.

I interpret the *Emerson Electric* decision as declaring that the termination of accrued sick leave benefits to employees prior to any showing that they affirmatively supported the strike, evinces an intent on the part of the employer to discourage employees from exercising their Section 7 rights by coercing them to refrain from supporting the economic strike called by their duly selected bargaining representative at the premises of their employer; and retaliates in a discriminatory manner against them for their presumed but unverified support of the strike. The fact that the employer may also have had a valid business reason for terminating the accrued benefits is of no consequence under this doctrine. In the face of this controlling precedents, I am constrained to here find a violation of Section 8(a)(1) and (3) of the Act. Cf. *General Electric Company, supra*. The fact that in *Emerson Electric* the union therein affirmatively protested to the employer withholding the benefits that the individuals who were unable to work were not participants in any strike, is not, in my opinion, sufficient basis for distinguishing the instant case wherein the record contains no explicit evidence of a challenge by the Union. The Board majority in *Emerson* specifically held:

> . . . we conclude that an employer may not rely on such speculative grounds to justify the termination of existing disbability benefits to employees which, as found here by the Admidnistrative Law Judge, had accured to them as a result of past work performed.

The absence of any showing by the employees on sick leave that they affirmatively supported the strike was the touchstone of the Board's rationale, and the protest interposed by the union representatives in *Emerson* was merely tertiary.

Having concluded that disposition of this case is controlled by the *Emerson Electric* decision of the Board, it becomes decisionally irrelevant to assess the merits of the contentions raised by Respondent challenging the validity either of the legal rationale supporting the majority opinion in *Emerson Electric* or the derrogating effect of that ruling upon the rights of employers to be free from the legal imperative of financing a strikes against themselves.

In sum, consistent with the dictates of *Emerson Electric*, I conclude and find that Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 right to refrain from declaring their position on the strike at the El Paso facility which commenced on

[9] *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970).

January 8, by terminating the sick leave benefits of employees Dove and Dominguez while they were medically excused from duty, thereby violating Section 8(a)(1) of the Act. I further conclude and find that this identical conduct of Respondent also violated Section 8(a)(3) of the Act.

Upon the foregoing findings of fact, and upon the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. Texaco, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Oil, Chemical and Atomic Workers International Union, AFL-CIO, Local No. 4-612, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By terminating the sick leave benefits of Leon Dove on January 8 and Antonio Dominguez on January 9 at a time when they were medically execused and prior to any showing on their part they affirmatively supported the strike which commenced at Respondent's El Paso facility on January 8, 1980, Respondent interfered with, restrained, and coerced employees in the exercise of rights guaranteed under Section 7 of the Act and unlawfully discriminated against them in violation of Section 8(a)(1) and Section 8(a)(3) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent terminated the sick and accident benefits of employees Antonio Dominguez and Leon Dove in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that Respondent be ordered to make Dominguez and Dove whole by paying to each of them the sick and accident benefits due them from the date the sick and accident benefits were initially terminated to the date on which they were cleared by competent medical authority to return to duty. Consistent with this directive, Respondent is ordered to pay sick and accident benefits to Leon Dove from January 8 through January 13, 1980, and to pay sick and accident benefits to Antonio Dominguez from January 10 through February 13, 1980.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[10]

The Respondent, Texaco, Inc., El Paso, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Upon the commencement of a lawful economic strike, and while the strike is in progress, discontinuing accident and sick benefits for employees during the normal term of their entitlement, but excluding all periods subsequent to the active participation of any employee or employees in strike activity or public demonstration of support of the strike.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercixe of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Make Antonio Dominguez whole by paying sick and accident benefits due him during the period January to January 13, 1980, with interest.

(b) Make Leon Dove whole by paying sick and accident benefits due him during the period January 8, to January 13, 1980, with interest.

(c) Preserve and, upon request, make available to the Board or its agents, all records necessary to analyze the amount of accident and sick benefits due in the effectuation of their remedial order.

(d) Post at Respondent's place of business in El Paso, Texas, copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by a representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."